

The Judicial Functions and Independence in Korea*

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Judicial independence means more than mere separation of power doctrine and the principle of fairness in official conducts. Judicial independence lies more in independent finding of law, and separation of power and fairness are only one of the doctrines and principles that reinforce independence of law-finding.¹⁾ Thus, any practice or institution that tends to violate independence of law-finding can function as a present or potential threat to judicial independence. Consequently, not only a threat of politicians in power to the judiciary with a specific demand but a culture in which personal ties and loyalties are highly valued can also be potentially inimical to judicial independence.

Upon reviewing briefly how the judicial department is organized and what functions the courts perform in Korea, the outstanding factors that pose as real and potential threats to judicial independence will be pointed out and analyzed. A few comments and suggestions will be laid out, including reform ideas and processes.

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1) Choi Dai-Kwon, *Bopkwa sahoe* (Law and Society), (Seoul: Seoul National University Press, 1992), pp. 123-157 (chap. 4: Judicial Independence).

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The Judicial Department of Korea consists basically in the three-tiered court system, that is, the Supreme Court on its zenith, five High Courts and one (two from the year 2000) High-Court-level Patent Court, on the intermediate level, and fifteen District Courts (including a Family Court and an Administrative Court) and their Branch Courts, on its lowest level. Within the jurisdiction of District Courts and Branch Courts there are a number of City Courts and County Courts that function practically as a small claims court. In addition, there is the Constitutional Court that is institutionally and jurisdictionally separate from the Supreme Court and the lower courts.

The major judicial functions of the court lie in dispute settlement in Korea as in other countries. In the process of resolving disputes, the court announces what the law is. As a matter of fact, the typical court cases include criminal trials, civil disputes including family disputes, administrative law cases, labor law matters, and tax disputes. Constitutional interpretation is, however, a matter primarily for the Constitutional Court composed of nine justices to determine. The ordinary court of justice is empowered only to appeal to the Constitutional Court for the constitutional review of a statutory provision on its own initiative or upon the request of a party to the case pending or in litigation whenever the outcome of the case in point hinges upon the constitutionality of the statutory provision. And any person, albeit not involved in any litigation at all, is still entitled to file a constitutional complaint (*Verfassungsbeschwerde*) with the Constitutional Court whenever his constitutional right is violated by a public action.²⁾ With

2) A public action no doubt includes statutes enacted by the nation's legislature, the National Assembly, all different kinds of administrative actions such as presidential and departmental rules, regulations and decisions, and judicial decisions made by the courts. The Constitutional Court Act provides, however, that a constitutional complaint against a judicial decision may not be filed at the Constitutional Court (Article 68 Section 1) Consequently, a constitutional complaint cannot be filed in practical terms against an administrative action, only because all other available remedies are statutorily required to be exhausted before filing a constitutional

a constitutional complaint filed, the Constitutional Court is empowered to review the constitutionality of a statutory provision and others.

No doubt, judicial independence is essential to the proper performance of the judicial functions of the courts. Indeed judicial independence is both an integral institutional feature and an unassailable principle of the Constitution of Korea. The Constitution provides: “The judges shall rule independently according to their conscience and in conformity with the Constitution and the law”(article 103); “No judge shall be removed from office, except by impeachment or with criminal sentence of imprisonment or heavier punishment, nor suspended from office, have his salary reduced, or suffer from any other unfavorable treatment except by disciplinary action”(Article 106).

Beyond the typical judicial functions, it is interesting to observe that the court is entrusted with a number of strictly speaking, non-judicial functions to perform. Those non-judicial functions include real property registration, corporation registration, family registration, judicial sale(public auction), escrow, court-controlled corporate reorganization, and composition with creditors. In the present economic crisis with the International Monetary Fund’s bailout financing, the Korean courts are entrusted with an unprecedented large number of both court-controlled corporate reorganization and composition cases which are getting increasingly important. In these restructuring cases, it is interesting to notice that the court comes to be all of sudden in the position of *de facto* operating or managing debt-ridden business corporations including decision of their death or survival. The

complaint and thus because a suit instituted against an administrative action to meet the exhaustion requirement entails a judicial decision against which a constitutional complaint may not be filed. Mostly, therefore, statutes alone are subject to a constitutional review by the Constitutional Court by way of constitutional complaint, with the exception of relatively few kinds of public actions where other remedies are not available such as a prosecutorial decision not to indict. The absolute majority of the case loads at the Constitutional Court is composed of constitutional complaints instituted against prosecutorial decisions not to indict. The rate of their success at the Constitutional Court is extremely low, however.

public trust with the independent, fair-minded court is such that the legal-system-wise important non-judicial functions are traditionally and institutionally entrusted to them.

It is only natural that the public trust lies high with the politically independent institution of the last resort that is designed to realize justice with fair-mindedness which is nothing but the very spirit of the law. The high public trust with the judicial department is such that individual judges who man the courts are solicited even to play a number of important social and official roles other than strictly those of judges in trials and in traditionally court-controlled proceedings mentioned above. One typical example is that a Supreme Court Justice always heads the Central Election-Management Committee and that local trial and high court judges always head the local election-management committees throughout the country almost without exception. Statutorily the election-management committees are required to include judges in their membership: 9 members (mostly senior judges, public prosecutors, and practising lawyers) of Central-Management Committee composed of three nominated by President, another three by the National Assembly and still another three by the Supreme Court whose nominees always include a Justice for its chairman; two judges at the larger city and provincial level election-management committee; and an unspecified number of judges at the borough, city and county level committees (Election Management Committee Act Article 4).

The situation is more or less the same with the Press Arbitration Committees and the Land Condemnation Committees. A press arbitration committee is instituted to arbitrate a refutation request or a correction request filed against a news medium by a person who claims to have been grieved by the former's false, unfair or defamatory report related to him before moving to the court where to realize his refutation or correction right. A press arbitration committee is composed of 40 to 80 members, two fifths of whom are statutorily required to be lawyers who are eligible to be judges(Act for Registration of Periodicals Article 17). Land condemnation

committees are also set up to deal with eminent domain related matters. And they are statutorily required to include judges in their membership. In practice, however, judges who currently man certain courts head both the press arbitration committees and the land condemnation committees.

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The cases that receive the strong public attention include those involving irregularities in elections and political financings bordering on outright bribery, although ordinary criminal and civil cases receive no less strong public attention. Accordingly, an unusually high demand and expectation for rulings according to the law have been strongly built upon the judicial department far more than upon elected public officials who are popularly regarded as having “unclean hands.” Yet the popular demand and expectation have not been well met by the courts. Only a small number of politicians out of the suspicious majority are actually charged selectively by the public prosecutors with election or financing irregularities, and still only a portion of them thus charged are actually found guilty while the rest of them usually announced to a lenient sentence or to an outright acquittal depending upon whether they are the governmental party members or the opposition members. Thus the popular saying “the powerful goes free and only the small fish is caught” has been coined. Another popular saying “the have acquitted and the have-not guilty” with ordinary cases, particularly criminal ones, has been also around the judiciary for quite some time. Thus, a schizophrenic situation has been observed existing between the strongly expected public trust with the court and the judges and the equally strong distrust and masochistic disillusion toward them in the public image of the judicial department.

The unpopular image of the public prosecutors and the “abuse” of the pardoning power of the President also have certainly contributed to the popular distrust toward the courts and the law in general. In Korea, the prosecutors alone have the prosecutorial power in whose exercise they have

discretion of whether or not to prosecute in the consideration of extenuating circumstances. In the public eyes the prosecutors act too unfair in the exercise of the prosecutorial power in favor of the haves and the those in power including politicians. They are so particularly when criminal bribery charges involve high-ranking officials and politicians. Once convicted, moreover, many are before not too long released from their prison under a general or special amnesty which is frequently issued on the occasion of national holidays. In Korea, introduction of American style “special prosecutor” as the cure for all the problems with the prosecutors has been one of the topics hotly debated for the recent years.

No doubt, the successful undertaking of the functions entrusted to the courts including those of trials is essential for the health of the political community that depends upon the rule of law and upon its concomitant judicial independence. The problems with judicial independence are, however, subtle and varied; they are more political and social than formal-legal in Korea. In the 1960s and 1970s the threats to judicial independence took the form of intimidations that were directed to individual judges who were not cooperative enough with the administration in meeting the latter’s desires in judicial decision makings. A typical example is to let police detectives to follow target judges closely to turn up any possible irregularity or improper behavior so as later on to embarrass, intimidate, or criminally charge against, them. A particular incident of such nature in 1971 had led a large number of judges, especially young ones, nation-wide to rallying to the cause of judicial independence. They had threatened to resign en masse in protest of the government’s practices which they saw as impairing judicial independence. That episode, the so-called “judicial crisis,”³⁾ came to the end with them withdrawing their resignation at the persuasion of their senior judges and with the show of conciliatory gestures by the government. But it had certainly contributed to the particular authoritarian measures that had

3) See Kim Tschol-su, *Honbophak* ha (Constitutional Law, vol.2), (Seoul: Jihaksa, 1972), pp. 940-953; Kim Ji-su, “Saboppadongi uimihanunkot” (The Meaning of the Judicial Crisis), *Sindong-a*, a monthly, October issue of 1971, pp. 86-93; etc.

taken by President Park in 1972.

Since then, the practices of the administration that were meant to influence judges to act to the taste of the former became much subtler. At present, Chief Justice of the Supreme Court is appointed by President upon consent of the National Assembly and Associate Justices are appointed by President upon consent of the National Assembly at the request of Chief Justice while other judges are appointed by Chief Justice with consent of the Justices Conference. The judiciary is composed of career judges who are hierarchically organized with Chief Justice on the top and with newly appointed at the bottom. In the judicial hierarchy, Chief Justice exercises a critically important assigning power over the entire lower court judges in terms of what place to send to what position. In order words, both their placement and promotion are all dependent upon the discretion of Chief Justice. Naturally there is a keen competition among judges not only in promotion in the hierarchy but also in terms of the location of their assignment since an assignment to particular courts in particular locations are preferred than others even on the same level in the hierarchy (for example, Seoul assignment is the most preferred).

In the competition, thus, judges in their judicial performance tend to take their cue from Chief Justice among others in various ways; they consciously or unconsciously become keen on conforming to standards, expectations, wishes, and even tastes set by “the top.” With the thus formed uniformity and hierarchy in mind, Chief Justice plays the role of the pivotal importance for judicial independence.⁴⁾ For judicial independence he can play either a role of defense wall from intrusion of the administration or a role of conduit through which the administration can exercise invisible and varied influences over the judicial decision makings by individual judges if President can appoint to Chief Justice a lower court judge or any other lawyer who keeps good terms with or subservient to him, even a crony. Now Chief Justice, once appointed, can in fact assign to some local court in rural areas against

4) Choi Dai-Kwon, *Bopkwa sahoe*, pp. 151-154.

their will or deny their promotion to a higher position or deny renewal of appointment upon completion of their ten year term of office those lower court judges who are too “independent” toward the top or toward the administration. Those judges who are disfavored in assignment or promotion usually resign and become practising lawyers. Many of reform-minded lawyers in practice naturally include former judges who were denied renewed appointment following their completion of the 10 years term of office and resigned in a quiet protest upon having received an unfavorable assignment for being too independent-minded toward “the top.”

The past judicial history is full of stories of which Chief Justices were independent from, and which ones too gentle toward, the President then in power. As for the appointment of Chief Justice, there has been a serious debate over the issue of regularizing a National Assembly hearing on a Chief Justice nominee to be held before it provides its consent to presidential nomination. And for the first time Korean Federation of Lawyers Associations this year came out to announce that it would set up its own search committee to draw a list of respected lawyers and recommend them to President for Chief Justice and otherwise would perform a screening function on any nominee chosen by President. The movement was occasioned because the term of the present Chief Justice will be up this September and new one will be in this fall. In the meantime, there have developed a highly sophisticated and complicated rules, regulations and practices that governed job assignment and promotion of judges in their hierarchy. Those rules, regulations and practices that are naturally designed to deter an unfairness in the job assignment and promotion are supposed to prevent possible internal complaints from arising in the hierarchy.

Nevertheless, there were a number of incidents in which a few individual judges were known as subjected to various “disadvantageous” treatments in their assignment, promotion or renewal of terms against their will and on grounds that are hard to justify in terms of judicial independence, and in their reaction they decided to retire from their judgeship. In 1988, a newly

appointed Chief Justice had to resign under the pressure from lower court judges (a third of them) who decided to sign up their protest in a group against him as an unacceptable choice for the job on the top. The next choice failed to receive the National Assembly consent under the circumstance where a wild protest against his appointment as Chief Justice was aired all over the nation including a large number of practising lawyers and even those future lawyers who were still in the training stage. These two episodes⁵⁾ concerning appointment of Chief Justice can be understandable at the backdrop of the judicial hierarchy on the top of which Chief Justice sits to wield over lower court judges in their promotion and assignment a considerable power and influence that are destined to function either positively or negatively for judicial independence from the administration and from the top of the hierarchy.

Another major factor that greatly bears on judicial independence is more social and cultural than institutional and political.⁶⁾ Personal ties and loyalties are highly valued in Korean culture as in other Asian cultures. Naturally there remains a black box in the knowledge of how a judge will make his judicial decision when his close friend or relative asks him for a favorable decision or is somehow involved in a case where he sits as a judge beyond the formal judicial exclusion, challenge and refraining rules. Such a request for an official favor made along the line of personal ties works as a considerable social pressure toward an official which it is extremely hard for him to resist. An educated guess is that individual judges range from ones who stick to the letters of the law without listening to those who quite liberally accommodate friendly requests to their decision. The majority probably belong to the middle range where they follow the

5) Chong Jong-sop, *Honbop yonku* (Studies on Constitutional Law), v. 2, (Cholhakkwa hyonsilsa, 1996), 229-267; Han Jin-su, "Saboppadongui jonbu" (Everything on the Judicial Crisis), *Sindong-a*, August issue of 1988, pp. 202-215; Sin Yon-su, "Jongchiaie noranan pankyoldul" (Judicial Decisions Made at the hands of the Politics), *Wolkan chosun*, a monthly, July issue of 1988, pp. 312-325; etc.

6) See Choi Dai-Kwon, *Bopkwa sahoe*, pp. 154-156; Choi Dai-Kwon, "Informal Ways Versus the Formal Law in Korea," *Seoul Law Journal*, v. 36 n. 3/4, pp. 51-61 (1995).

letters of the law in the main while accommodating friendly requests when they can do so with their discretionary power.

For a long time those former judges (and former prosecutors) who just retired to open their law office have been known to have a brisk lawyer business in ways where the cases which they brought to the court were favorably disposed by their-former-colleague judge in charge (for example, in the form that a party they represent wins various favorable decisions). Judges and public prosecutors presently in office were generally known to help the former colleague lawyers to make a quick success at least for a few years from their retirement by way of dispensing various subtle favorable decisions to them within their discretionary powers. Naturally, prospect clients tend to look for a just-retired-former-judge lawyer more than an old timer lawyer to increase their chance of winning a favorable judicial decision. This in turn makes those just retired former officials prosper with their lawyer business. The practice, so-called “preferential treatment for former officials,” has been put to a severe criticism to its extinction in the last few years.

The two most embarrassing episodes for judicial independence took place, one in 1998, and the other in 1999.⁷⁾ It is known that respectively a

7) For information, see a few news paper clippings dealing with the incidents which include *Chosun ilbo* March 23, 1998 articles “Bili pansa 15 myong jonwon kisoyuye” (Discretionary Decision not to Prosecute Judges Involved in Irregularities) and “Komchal, ‘Bilipansa sabopcholi yubo’,” (Prosecutors, Refused to Prosecute Judges Involved in Irregularities); *Chosun ilbo* February 1, 1999 issue “Daejonbopjobili susabalpyomun (yoyak)” (Summary, Investigation of Judicial Irregularities in Daejon News release) and “(Bojobili) Susailji” (Investigation Diary, Judicial Irregularities). See also *Bopjobili kunjolkwa sabopkyehyokul wihan Daetoronhoe* (Grand Discourse for Elimination of Judicial Irregularities and for Judicial Reforms), organized by Kyehyokbyonhosamoim, Kyongsilyon, and Chamyoyondae, held on April 21, 1998; *Bopjobiliae kwanhan yonku*(Corruption in Legal Circle and Its Control), (Seoul: Hankukhyongsajongchaek yonkuwon(Korea Journal of Criminology), 1999). Particularly about the “food chain” formed among the judges, the public prosecutors, and the practising lawyers, see Ha Jong-Dae, “Bopjo samryun mokisasul daehaebu” (A Grand Anatomy of the Food Chain among the Three Branches of the Legal Profession), *Sindong-a*, April issue of 1998, pp. 212-240.

former-judge practising lawyer and a former-prosecutor lawyer had emerged as a “rising star” who were successfully able to almost monopolize all the cases filed at the particular courts in the local cities where they had practised and to amass a fortune within only a short period of their practice. The secrets of their success had consisted in managing with varied methods of remuneration for service a network of several tens of “brokers” who were in fact officials of the courts and the prosecutorial offices and policemen. These officials had referred to the lawyers potential clients whom they encountered in the line of their official duties. At the same time, the lawyers were also known to have managed a particular close tie relationship with individual judges and prosecutors in their respective localities. Some of the judges and prosecutors were known to have even referred to the lawyers a few clients whom they happened to encounter, for example, when the latter asked the former for advice for a lawyer. Probably the cases whom the lawyers represented must have also received a favorable attention by the judges and prosecutors. In order to maintain such a rewarding close tie relationship with judges and prosecutors, the lawyers were known to have regularly entertained them like inviting them to the first class restaurants, drinking parties, and golf tours at the lawyers’ expenses and to have also extended to judges and prosecutors “friendly” gifts including monetary gifts of modest but varying amounts handed in time of holidays or on arrival or on departure of individual judges and prosecutors.

The particular lawyers, many of the officials of the court and the prosecutorial office and policemen, and others were arrested and tried on various criminal charges. In the meantime, several judges and prosecutors were put to various disciplinary measures including dishonorable discharges. Many other judges, prosecutors, and practising lawyers take the incidents as the most severe embarrassment and great disgrace to their face. The question is whether they were single incidents that were caught or whether they were only an iceberg the bigger part of which was hidden under water. In any case, the public outcry against the kinds of practice was such that now the nationwide serious “judicial reform” is about to be undertaken,

although its directions and contents are not fully known yet. Already for a few months a presidential judicial reform committee has been set up to come up with reform proposals within a foreseeable future to advise President for decisive actions including judicial reform legislations. In the meantime, a proposal for a graduate-level professional legal education to reform the present undergraduate-level legal education has also been put presently to public hearings for adoption as a part of the broader educational and legal-judicial reforms.

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It is obvious that judicial independence is essential for the judiciary properly to perform its various functions including trials that are critical for the well-being of the nation. From what we have discussed above, it is also clear that potential threats to judicial independence are currently coming mainly from the two sources: the power of assignment and promotion which Chief Justice wields over lower court judges plus the present method of appointing him and plus the ten years of term of office for judges; and the culture in which personal ties and loyalties are valued.

For the cause of judicial independence, the hierarchically organized career judge system should be radically reformed so that ordinary judges do not have to take cue from the Chief Justice whatsoever. Above all, the judicial hierarchy thus formed with the assigning and promoting power of the Chief Justice over the lower court judges has proved to be an anathema to the very judicial independence. Naturally, a number of reform ideas and suggestions have been around for some time. Among many others, a pet idea has been that judges should be preferably selected from among the respected, established lawyers with life or longer tenure than ten years rather than fresh out of school. Along with the idea, another suggestion is that the rank order among judges from the district court judges to the Justices should be eliminated so that Chief Justice has no more assigning and promoting power and that judges are *de facto* co-equal to, and

independent from, each other in their respective sphere of judicial power. An idea of recall or subjecting judges to popular approval after a certain period of time interval following their appointment has also been suggested.

A close personal tie culture has an affinity to various undesirable judicial practices and to bribery. You cannot eliminate your culture with the governmental fiat alone. Education and hard training in professional ethics of, and cultivation of the sense of mission in, judges, prosecutors and practising lawyer cannot be too overemphasized. For that purpose, Korea has inherited from the past an excellent book *mokminsimso* (牧民心書: 1818), written by a famous Confucian scholar Jong Yak-yong (丁若鏞: 1762-1836). The book is very interesting for our purpose because it teaches how properly for an official to conduct his official duties while being Confucian and cultivated. Confucian culture tends to value personal ties and loyalties. And yet the book teaches us that being a Confucian does not have to conflict being a formal duty-bound judge or other official. Above all, the book strongly teaches the judge to stick to the law, to be fair-minded, and to be serious in listening to. Needless to add, instructions in the Western formal law and American style rules and regulations of professional ethics alone would not solve the problems in Asian cultural environments. The book is going to be rediscovered for legal education in Korea. We learned that Ho Chi-min kept *mokminsimso* everyday near his hand to read when he was still alive.

〈抄 錄〉

韓國 司法府의 機能과 司法權의 獨立

崔 大 權*

司法府가 수행하는 가장 중요한 기능은 말할 것도 없이 民·刑事事件 判決 등 법을 통한 紛爭解決의 기능이지만, 엄격히 이야기하여 사법기능이라고 하기 힘들나 대단히 중요한 公的 信賴가 요구되는 非訟事件, 登記, 戶籍, 供託, 競賣, 法人의 監督, 會社整理, 和解, 鑑定 등을 담당하고 있으며, 심지어 사법부를 구성하는 판사는 개인적으로 각급 選舉管理委員會, 言論仲裁委員會, 土地收用委員會 등의 위원장 및 위원 등으로서의 기능도 수행하고 있다. 이러한 각종 중요 기능이 사법부에 맡겨지고 있는 것은 司法府에 대한 信賴 때문이며, 그리고 이들 기능의 원만한 수행을 위하여 司法權의 獨立이 必須的인 것은 물론이다. 사법권의 독립은 단순한 權力分立의 原理 및 公權力 行使에 있어서의 公平의 原則 이상의 것 즉 法 發見에 있어서의 獨立을 본질로 한다. 그러므로 독립한 법 발견에 영향을 미치는 것이면 그것이 무엇이든지 사법권의 독립에 대한 현재적 및 잠재적 침해 용인으로 작용한다고 생각한다.

사법권의 독립을 위하여 헌법은 제103조, 제106조 등 여러 조항을 두고 있으며 여러 제도적 장치를 마련하고 있다. 이러한 형식적·제도적 장치에도 불구하고 최근에 司法府에 대한 不信이 팽배해 있으며 司法改革에 대한 목소리가 크다. 사법불신의 要因은 무엇이며 그 治療方法으로 어떠한 것을 생각할 수 있을 것인가?

사법불신의 요인은 다층·복합적이지만 不法選舉·不法政治資金·高位職 賂物 등 사건의 납득하기 힘든 司法的 處理現實과 관련되어 있어 유전무죄·무전유죄 및 유권무죄·무권유죄 등의 말로 대변되는 사법불신을 일으켰으며, 檢察의 不公正한 不起訴處分 등과 赦免權의 濫用 등도 이에 기여하였다. 나아가 분석적으로 파악할 때 이 같은 사법부의 불신을 일으키게 하는 사법기능 수행에 前官禮遇, 부로커 고용, 의정부 및 대전 법조비리 사건에서 나타난 바와 같은 法曹3輪간의 먹이사슬 등의 法曹慣例가 또한 기여하고 있으며, 이 같은 법조비리에는 義理와 人脈을 중시하는 儒敎 文化的 要因도 작용하고 있는 것이다. 그러한 만큼 이를 치유하고 법조신뢰를 회복하기 위하여는 제도적 접근과 함께 문화적 처방도 요구된다.

치유의 제도적 처방의 하나로 다년간의 법조경력을 거쳐, 따라서 능력이나 자질에 관한 검증이 끝났다고 할 수 있는 인사 가운데서 판사를 선발하는 제도, 대법원장·대법관 임명에 있어서의 人事聽聞會 制度의 도입, 대법원장이 행사하는 하급법원 판사의 보직·승진 등의 인사권을 통하여 형성되는 판사들간의 역기능적 경쟁체제 및 이 체제가 불러일으키는 판사들의 순응주의·독립성 결여 현상을 치유하기 위한 職級制 廢止를 포함하는 대법원장의 하급법원판사 인사권의 폐지 내지 제한, 종신제 도입 혹은 임기제·정년제의 폐지 내지 과감한 연장 등의 제안을 하였다. 아울러 문화적 요인을 치유하기 위한 처방으로 대단한 유학자로서 유교적이면서도 公職에 있어서의 倫理 내지 使命을 설교한 丁若鏞의 牧民心書 학습을 법학교육·법조인훈련과정의 필수과목화할 것을 제안하였다.

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